Investigating Military Complaints

Pretest! Determining the Basis of an Issue

Overview

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- Types of Discrimination
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Overview

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Overview

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- Preponderance of Evidence
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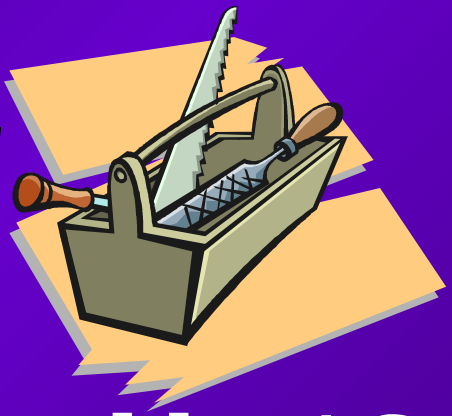
Applicability

- Current and former military members of Army or Air National Guard or in Active Guard/Reserve (AGR) status under Title 32, U.S.C.
- Applicants for membership in Army or Air National Guard and for duty as AGR
- Beneficiaries of services of National Guard under Title VI of 1964 CRA

"Tools of the Trade"



- Letter of Appointment - Appointed by AG or any officer with appointing authority
- Complete case file **(including cmdr's Reprisal Prevention Plan)**
- NG Pam 600-22/ANGP 36-3
- NGR 600-22/ANGI 36-3
- Any directives or regulations pertinent to issues of current case

NGB Form 333

DISCRIMINATION COMPLAINT IN THE ARMY AND AIR NATIONAL GUARD

For use of this form see NGR AR 600-22/NGR AF 30-3, the proponent agency is NGB-EO

HR/EO, MEO USE:

NGB Case Number

Privacy Act Statement ☐ Informal ☐ Formal

Authority: 42 U.S.C. Section 2000d
Principal Purpose: To document the formal filing of a military complaint of discrimination in the Army National Guard or the Air National Guard
Routine Use: None
Disclosure: Voluntary. However, failure to complete all portions of this form could affect the timely processing, or result in the rejection or dismissal of your complaint.

INSTRUCTIONS

Part I - To Be Completed by Complainant
Submit to Your Unit Commander

Any part-time military member, AGR member, former member, applicant for membership or beneficiary of the Army or Air National Guard who believes that he or she has been discriminated against because of race, color, religion, gender, or national origin (or retaliation for having participated in any way in a protected equal opportunity activity), in a matter subject to the control of the Army or Air National Guard, may file an individual complaint of discrimination. You are encouraged to discuss the complaints with and to seek assistance from your immediate supervisor, unit commander, members of the chain of command or EOA/EOT staff. Fill out Part I of this form and file the complaint within 180 days of the date of the alleged discrimination or the date that you became aware of the discriminatory event or action. The complaint should be filed with the unit commander (if the commander is not the alleged discriminating official) or with your unit EO representative. You may file with any other commander in the chain of command, the Adjutant General, the National Guard Bureau, or Inspector General Office. However, regardless of where the complaint is filed, it will be referred to the lowest applicable command level for action.

1. COMPLAINANT

a. NAME	b. RANK	c. POSITION

2. GENDER	3. RACE	4. NATIONAL ORIGIN

5. HOME ADDRESS *(Including Zip Code)*	6. TELEPHONE NUMBERS	
	a. BUSINESS:	b. HOME:

7. ACTIVITY OR UNIT IN WHICH ALLEGED DISCRIMINATION OCCURRED:

8. ARE YOU: *(CHECK ONE)*
- ☐ PART TIME MILITARY MEMBER
- ☐ AGR TITLE 32/ADSW TITLE 32
- ☐ APPLICANT FOR NG/AGR MEMBERSHIP
- ☐ FORMER MILITARY MEMBER
- ☐ BENEFICIARY OF NG

9. PERSON YOU BELIEVE DISCRIMINATED:

a. NAME	b. TITLE

10. REPRESENTATIVE *(If any)*:

a. NAME	b. ADDRESS

11. CHECK BELOW THE BASIS *(Reasons)* FOR ALLEGED DISCRIMINATION:

☐ R RACE (Check Your Race) ☐ Black ☐ White ☐ American Indian/Alaskan Native ☐ Asian/Pacific Islander

☐ C COLOR (State Your _____

☐ L RELIGION (State Your Religion) _____

☐ G GENDER(Not Sexual Harassment) (Check Your ☐ Male ☐ Female

☐ S SEXUAL HARASSMENT (Check Your gender) ☐ Male ☐ Female

☐ O REPRISAL (Based Upon EO/EEO ☐ Yes ☐ No

☐ N NATIONAL ORIGIN (State Your National ☐ Hispanic ☐ Other *(Specify)* _____

12. CHECK FOR SPECIFIC ALLEGATIONS AND ISSUES:

☐	Appointment/Enlistment	☐	Evaluation/Appraisal	☐	Reassignment
☐	Assingment of Duties	☐	Harassment	☐	Retirement
☐	Awards/Decorations	☐	a. Non-Sexual	☐	Time and Attendance
☐	Disciplinary Action	☐	b. Sexual	☐	Training/Education
☐	Duty Hours	☐	Promotion/Non-Selection	☐	Other

13. STATE ALLEGATION AND ISSUES *(Explanations, background, and evidence can be attached as supporting material; they are NOT issues).*

Issues: A. Number each issue
B. Briefly list the alleged act of discrimination, the basis, and the date(s) it took place.
C. Indicate the name(s) of the alleged discriminating official(s) (ADO).

SAMPLE: I was discriminated against on (date) on the basis of (Race, Religion, or other basis) when (name the ADO) and briefly list the discriminatory event(s) or personnel action(s). Attach additional blank sheets, if necessary.

1. _____

2. _____

3. _____

14. WHAT CORRECTIVE ACTION DO YOU WANT TAKEN TO RESOLVE YOU COMPLAINT?

_____

_____

_____

15a. SIGNATURE OF COMPLAINANT	15b. DATE

16. OFFICIAL RECEIVING COMPLAINT

a. NAME	b. TITLE
c. SIGNATURE	d. DATE

PART II - COMPLAINT MANAGEMENT PROCESSING

TO BE COMPLETED AT THE LOWEST APPICABLE COMMAND LEVEL
The above discrimination complaint was reviewed IAW NGR (AR) 600-22/NGR (AF) 30-3

COMPLETE AS APROPRIATE

1. WHEN DID YOU RECEIVE THE COMPLAINT? | DATE *(YYYY/MM/DD)*

2. WAS THE COMPLAINT:

a.	Accepted	☐	All	☐	In Part		
b.	Referred	☐	All	☐	In Part	TO WHOM	
c.	Dismissed	☐	All	☐	In Part	(State Reason)	

3. WHAT WAS THE RESULT OF THE COMMANDER'S INQUIRY?
☐ Discrimination Confirmed ☐ Discrimination Not Confirmed ☐ Discrimination Undetermined

4. DID YOU ATTEMPT RESOLUTION OF THIS COMPLAINT? ☐ Yes ☐ No | DATE *(YYYY/MM/DD)*

5. IF YES, WAS THE COMPLAINT ☐ Settled ☐ Withdrawn

6. WAS COMPLAINANT SATISFIED WITH THE RESOLUTION? ☐ Yes ☐ No

a. SIGNATURE OF COMPLAINANT | b. DATE *(YYYY/MM/DD)*

7. IF NOT SATISFIED WITH RESOLUTION OR WITHDRAWN THE COMPLAINT WILL AUTOMATICLLY APPEAL TO NEXT COMMAND LEVEL.

☐	Withdraw the Complaint	SIGNATURE OF COMPLAINANT	DATE *(YYYY/MM/DD)*

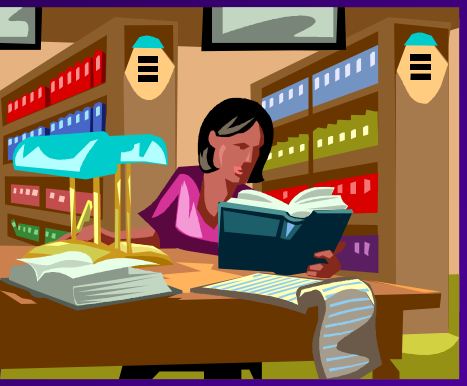
8. THIS FORM AND ALL ATTACHMENTS, AND INQUIRIES IS FORWARDED TO THE NEXT COMMAND LEVEL ON | DATE *(YYYY/MM/DD)*

9.

10a. SIGNATURE OF COMMANDER | 10b. DATE *(YYYY/MM/DD)*

Duties of the Investigator

- Conducts interviews/gather facts & supporting evidence
- Remains Unbiased and Neutral. (Although you are appointed by the commander, you do NOT represent either party.)
- Prepares a Report of Investigation (ROI)
- Makes conclusions/recommendations based on the facts discovered and available information



Preparing for the Investigation

- Contact SEEM
- Review fact-finding techniques and procedures
- Review the entire case file
- Make absolutely certain that basis and issues are clear

The Basis? ? ? What's Covered?

- Race/Color - Includes every race and color
- Sex (Gender) - Includes both genders
- Sexual Harassment
- National Origin
- Religion
- Reprisal - For prior EO/EEO activity

Exercise 1
Determining Basis and Issue

Discrimination – based on RACE

- Actual membership in a specific race
- Appearance - Clothes or hair style
- Beliefs or expressions
- Membership in organization - NAACP
- Association with others - Interracial dating

Sexual Harassment

- **“Quid Pro Quo” An employment decision is based on submission or rejection of unwelcome sexual conduct**

- **“Hostile Environment” Deliberate or repeated unsolicited and unwelcome verbal or non-verbal behavior that is severe or pervasive enough to affect a person’s work environment**

Examples of Sexual Harassment

- **Verbal: Catcalls, jokes, sexually degrading language, profanity**
- **Non-verbal: Leering, sexual cartoons, pictures or email, blowing kisses, giving a personal gift, blocking a passageway, pinching, bumping, cornering**

“OTHER” HARASSMENT

“HARASSMENT” Deliberate and repeated unsolicited and unwelcome verbal or non-verbal behavior that is severe or pervasive enough to affect a person’s work environment that connects to a PROTECTED category for the BASIS

Reprisal – Who's Eligible?

- Previously filed an EO/EEO complaint
- Witness in an EO/EEO complaint filed by someone else
- Marriage to, or association with, person who has previous EO/EEO protected activity
- Complained (even in the absence of actually contacting EO/EEO)

What are the “Issues”?

An event, a personnel action, a condition or decision that caused a person to believe discrimination occurred

Examples: awards, leave, training, non-selection, promotion, LOR, discharge

Exercise 2
Distinguishing Issues from Background Info

Allegation Statement

Allegation statements must have certain elements to be valid. Requires identifying the:

- **Basis**
- **Issue**
- **Name of Individual(s) Responsible**
- **Date Issue Occurred**

Example: SFC Bob Nettles alleges he was discriminated against on 2 Feb 07, based on gender (male), when MSG Gwen Arnold ….

Exercise 3
Writing an Allegation Statement

Types of Discrimination

- **Disparate Treatment**
- **Adverse Impact - Neutral policy or practice which is applied evenly to all, but has effect of disproportionately excluding a group (i.e. CPC)**
- **Religious Accommodation - Must decide if undue burden**

Exercise 4
Similarly Situated

Naming of Witnesses

- Obtain a list from complainant and the named Primary Agency Witness
- List should include name of potential witness and his/her expected testimony
- IO makes final decision on witnesses
- Document reasons for not interviewing those named by the parties

Exercise 5
Identifying Witnesses

The Investigation Plan

- Simple statement of intent, which lists proposed course of action
- Provide copy to SEEM before site visit
- Helps focus investigation progress
- Identify suspense dates

Elements of Investigation Plan Include:

- Identity of complainant
- Basis and Issues
- Identity of Primary Agency Witness
- Identity additional information needed
- List of logistical support required
- List of Complainant and Agency witnesses
- Interview schedule

Criminal Conduct

- EO investigations do not normally address criminal charges
- If IO uncovers evidence of possible criminal conduct, immediately contact the appointing authority or servicing SJA for guidance
- If discovery occurs during an interview, stop the interview immediately and contact the above

Reliable Evidence

- Need dependable/trustworthy evidence.
- Factors:
  - Does witness have an interest in outcome?
  - Is witness biased?
  - A statement of fact or a mere conclusion?
- Evidence of questionable reliability should not be ignored – it may <u>lead to</u> reliable evidence

Types of Evidence

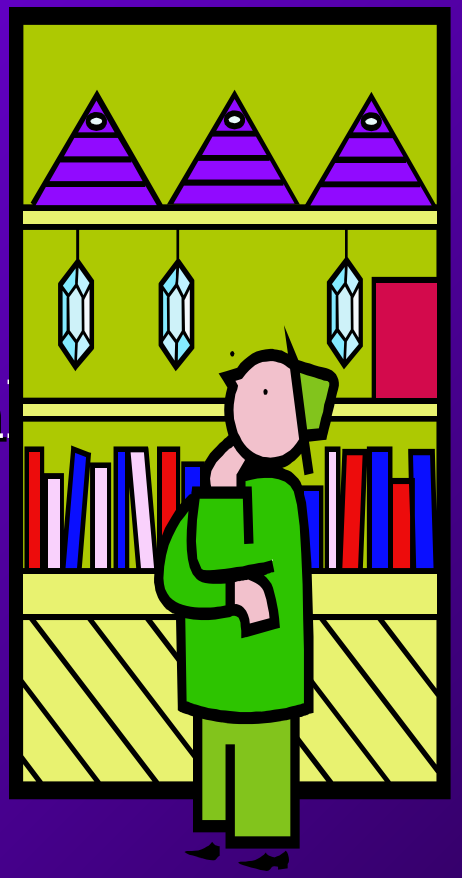
- **Documentary - Reports, regulations, official and personal correspondence**
- **Computer records – Data captured from databases, e-mail correspondence, MFRs**
- **Testimony - Presented by live witness in form of sworn testimony**
- **Circumstantial - Evidence which indirectly proves the existence of a fact**

Types of Evidence

- **Hearsay - Testimony not based on personal knowledge. Based on what an individual was told by another/third-person**
- **Direct - Reveals intentional discrimination caused by an adverse action**

Types of Evidence

- **Comparative - Compare treatment of complainant w/similarly situated**
- **Statistical - Examines numerical differences. It cannot prove discrimination standing alone. More powerful when coupled with other evidence.**



Exercise 6
Statistical Evidence

Witnesses

- Complainant (CP)
- Primary Agency Witness (PAW)
- Expert or professional witness - has special knowledge about a topic and can testify how a process should work
- Character witness - Verify reputation of others (such as personality traits)

Denial of Witnesses

- Redundancy
- Pattern already established - Sufficient information exists so that analysis of complaint merit is possible
- Not relevant to issues
- Must be documented in ROI with reason witness was denied

Preparing for the Interview

- Private room
- Court reporter, blank affidavits, tapes and/or tape recorder
- Copies of Privacy Act
- Prepared list of questions
- Establish a schedule
- Notify local cmdr at the location of the investigation

HOMEWORK ASSIGNMENT
Preparing for an Interview

Interviews

- Read introductory statement and swear-in witness (Appendix C)
- Ask direct questions
- Ask two final questions
  - Is there anything else you would like to say that has bearing on this matter?
  - Are there any other people to interview?
- Read final statement (Appendix C)

Taking Testimony

- Must be sworn/affirmed
- No requirement for signature if witness testimony is transcribed
- Named management official and complainant not entitled to have rep present when interviewed
- When answer is unclear, ask again
- Only IO and person being interviewed are present during interview

Interviewing - What to avoid

- Rushing
- Ask leading questions
- Being patronizing
- Asking irrelevant personal questions
- Making inappropriate promises
- Giving opinion on the merits of case

Exercise 7
Practicing Your Interviewing Skills

Options when witnesses absent

- Visit person at new location
- Wait for individual's return, as long as absence is short and temporary
- Telephonic interview (recorded)
- Mail written interrogatories and receive answers in the form of a sworn, written response

Immunity and Confidentiality

- Never grant a witness immunity from prosecution
- Nothing is ever done "off-the-record"
- Although complainant will eventually receive a copy of a redacted ROI do NOT not give the ROI to complainant
- Never inform one witness of the testimony of another

investigator/investigation

- Draft questions in advance of interviews
- Interview complainant first
  - Clarify issues
  - If significantly new issues raised, check with appointing authority about expanding scope of investigation
- Avoid questions that allow a “yes” or “no” answer

Investigators/Investigations

- Remain focused on the issues
- Investigation is an administrative procedure, not a criminal procedure
- Assesses credibility, motivation, bias and interests - Examines relationships of witnesses with complainant and named management official
- Corroborate, Corroborate, Corroborate - Never accept anything at face value. Look for supporting information.

good investigator/investigation

- Creates a chronology of events
- Asks for technical/expert advice on where and how to get evidence to support statements made by witnesses on matters relating to the issues addressed in the complaint
- If IO becomes aware of additional allegations, immediately notifies appointing authority for guidance
- Maintains neutrality

Preponderance of Evidence

- Burden of proof in military complaint rests with the complainant
- Evidence on one side must outweigh the evidence on other side (even if it is only 51 percent to 49 percent)
- Sufficient enough to incline a “Fair & Impartial” person to elect one way over the other

Analytical Framework

Certain established principles are employed when analyzing a complaint. The three step process is to establish:

1. Prima Facie
2. Legitimate, non-discriminatory reason
3. Pretext

Exercise 8
Legitimate Reasons

Prima Facie Criterion "Hiring"

- Complainant is a member of a protected class
- Complainant applied and was qualified
- Non-selected
- Person from outside protected group was hired or position stayed vacant and employer continued to seek applicants

Prima Facie Criterion "Hiring"

Mere fact that complainant was not in same protected group as selectee does not itself establish prima facie case

Prima Facie Criterion "Terms and Conditions of Employment"

- The complainant is a member of a protected class
- The complainant is treated differently from a similarly situated member who is not in the complainant's protected group
- Compared members in chain of command or same work unit
- Direct evidence of discriminatory intent

Prima Facie Criterion "Reprisal"

- Complainant previously engaged in EO/EEO protected activity
- Management was aware of activity
- Management took an action that disadvantaged the complainant
- Causal connection between activity and management's action

Prima Facie Criterion "Sexual Harassment" (Hostile Environment)

- Complainant is a member of a protected class
- Subjected to unwelcome sexual behavior
- Harassment complained of based on gender
- Term, condition of employment altered by creating an abusive environment
- Employer knew or should have known

Prima Facie Criterion "Sexual Harassment" (Quid Pro Quo)

- Supervisor made sexual advances
- Employee's submission to advances was expressed or implied condition of employment
- Substantially affected complainant's job or motivating factor in reassignment or separation
- Opposite – gender Soldiers not affected in same way

Legitimate Reason and Pretext #1

- Management states its legitimate, non-discriminatory reason
- Complainant must show that, by a preponderance of the evidence, that management's reason is just "Pretext", that it is false and just an attempt to cover up the REAL discriminatory reason for the the disparate treatment

Legitimate Reason and Pretext #2

- Management does not have to be perfect to prevail
- Going against policy does not automatically mean discrimination
- Management can select any qualified candidate. Title VII does not ensure selection of the best candidate

Exercise 9
Pretext

Report of Investigation (ROI)

- Impartially written
- Accurate and dependable
- Can exist as a “stand-alone” document that includes all pertinent documents, regulations and testimony
- Prepared as if reader has no prior knowledge of complaint or the military
- Addresses each basis and issue presented in the complaint

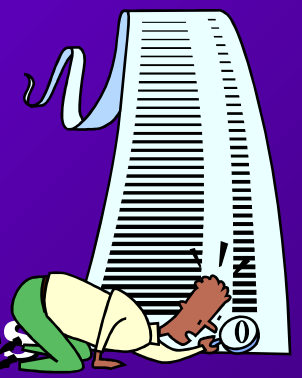
HOMEWORK ASSIGNMENT
Preparing the Report of Investigation (ROI)

The ROI . . .

- Cite full name, rank and duty of any person mentioned in the report the first time they are identified
- When using abbreviations or acronyms, spell the word out the first time followed by the abbreviation in parentheses “( )”

Evidence and Exhibits Include:

- All documents regarding EO process to this point (formal complaint, prior inquiries, etc)
- Testimony of complainant, named management official and all witnesses
- Pertinent documents and memoranda, etc
- Other information (statistics, organizational chart, unit demographics)



Discussion and Analysis

- Weigh the evidence
- Identify your judgment and observations, supported by appropriate facts/documentation discovered
- Cite your references (tab letter/number and page number)
- Focus on basis and issues

Discussion and Analysis

- Identify conflicting testimony and its relative importance
- Clearly identify why you chose to believe one piece of information over another
- Analyze using three step process
  - Prima facie
  - Legitimate, non-discriminatory reason
  - Pretext

Upon Completion of ROI

- Deliver original and one copy to Appointing Authority (Cmdr) and one copy to SEEM
- Do not discuss results with any party
- Refer all questions to SEEM

Then what?

- SEEM reviews for administrative sufficiency
- Cmdr reviews findings and recommendations for clarity
- Cmdr requests JA legal sufficiency review
- Any deficiencies noted, ROI is returned to investigator for corrections
- If clear and legally sufficient, cmdr provides a redacted copy of the ROI to the complainant and arranges to meet with him/her to attempt resolution

Course Hotwash & Evaluations